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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. WILLIAM H. SPIKER, Defendant.	No. CR 07-0462 MAG UNITED STATES' MOTION IN LIMINE TO ADMIT EVIDENCE OF OTHER CRIMES, WRONGS, OR ACTS PURSUANT TO FED. R. EVID. 404(b) Trial: November 13, 2007 Time: 8:30 a.m. Court: Hon. Joseph C. Spero

The following prior crimes, wrongs, or bad acts of the defendant are admissible under Federal Rule of Evidence 404(b) to show intent, identity and absence of mistake.[1]

- September 23, 1993 conviction in Santa Cruz Superior Court for driving while under the influence of alcohol and/or drugs with three prior convictions for driving while under the influence, in violation of California Vehicle 23152(A)

[1] The government will not seek to introduce any other 404(b) evidence in its case-in-chief, though it reserves the right to seek admission of defendant's crimes, wrongs, or acts which become relevant during the trial to rebut defendant's case. In a separate motion, the government moves for admission of defendant's conviction for felony driving while under the influence pursuant to Fed. R. Evid. 609(a)(1). If this conviction is admitted under Rule 609(a)(1), it should also be admitted for purposes of Rule 404(b). *See United States v. Cordoba*, 104 F.3d 225, 229 (9th Cir. 1997).

(Case No. 43-05566), for which the defendant was sentenced to a two-year prison term.

- January 4, 2007 conviction in San Francisco Superior Court for reckless driving, in violation of California Vehicle Code 23103.

I. ADMISSIBILITY OF EVIDENCE UNDER RULE 404(b)

Federal Rule of Evidence 404(b) provides in pertinent part:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Evidence is admissible under Rule 404(b) if four elements are satisfied: (1) it must be offered to prove a material element of the offense for which defendant is now charged; (2) if the prior conduct is offered to prove intent, it must be similar to the charged conduct; (3) proof of the prior conduct must be based on sufficient evidence; and (4) the prior conduct must not be too remote in time. *See, e.g., United States v. Howell*, 231 F.3d 615, 628 (9th Cir. 2000); *United States v. Arambula-Ruiz*, 987 F.2d 599, 602 (9th Cir. 1993). When these four elements are satisfied, the court then balances the probative value of the evidence against any prejudicial effect. *Howell*, 231 F.3d at 629; *Arambula-Ruiz*, 987 F.2d at 604. To be excluded under Rule 403, the evidence must be unfairly prejudicial and substantially outweigh the probative value of the evidence. *See* Fed. R. Evid. 403; *see also Arambula-Ruiz*, 987 F.2d at 604.

The law is clear that Rule 404(b) is a rule of inclusion. *United States v. Jackson*, 84 F.3d 1154, 1159 (9th Cir. 1996). "Unless the evidence of other crimes tends only to prove propensity, it is admissible." *Id.* Thus, evidence of prior bad acts is admissible "except where it tends to prove *only* criminal disposition." *United States v. Rocha*, 553 F.2d 615, 616 (9th Cir. 1977) (emphasis in original).

Here, the evidence offered as to defendant's prior convictions for driving while under the influence of alcohol and reckless driving passes at least three out of the four factors, and its prejudicial effect does not substantially outweigh its probative value.

II. ANALYSIS

Evidence of defendant's prior conduct is admissible to show intent, identity and absence of

mistake. Regardless of whether the defendant disputes the charges on grounds of identity or mistake, the government may still offer evidence on these grounds in light of its burden beyond a reasonable doubt. *See, e.g., United States v. Nelson*, 137 F.3d 1094, 1107 (9th Cir. 1998) (noting defendant's state of mind is relevant even though it was not a disputed issue in the case), *cert denied*, 525 U.S. 901 (1998). The prior conviction is particularly relevant in the event the defendant alleges that because he was on prescription medication he was unaware of the amount of alcohol he was consuming and that his driving under the influence was therefore a mistake. It is material to this case that the defendant's conduct was not a mistake.

There is a scarcity of federal precedent involving cases where driving under the influence is charged, but the issue has been raised in the State of California. In *United States v. Ortiz,* defendant was charged with second degree murder after a vehicle collision resulted in the death of several individuals. *United States v. Ortiz*, 109 Cal.App.4th 104 (Cal.App.1.Dist. 2003). The government sought the admission of defendant's prior convictions for driving while under the influence and reckless driving. The Court found the prior convictions admissible because it tended to establish a subjective awareness on the part of defendant of the disastrous consequences that can follow in the wake of recklessly operating a motor vehicle on a public highway. *Ortiz*, at 116. In this case, defendant's criminal history and his subsequent failure to conform his conduct to statutory norms is relevant because it reflects actions done with a subjective awareness of danger greater than that of other drivers, and a willingness to commit the acts anyway.

The admissibility of prior incidents is also based, at least in part, upon the fact that the prior incidents resulted in compulsory attendance at educational or rehabilitation programs. (*See, e.g., People v. Murray*, 225 Cal.App.3d 734, 746 (Cal.App.2d Dist. 1990); *People v. Brogna*, 202 Cal. App. 3d 700, 705 (Cal.App.2d Dist. 1988)*; People v. McCarnes*, 179 Cal. App. 3d 525, 532 (Cal.App.4th Dist. 1986)). Such attendance supports the inference that the defendant learned from these programs about the risks of driving recklessly or while intoxicated. (*See, e.g., ibid.*). This would serve to rebut any argument that the defendant's intoxication was a mistake. Having previously attended educational rehabilitation programs, the defendant is on notice of the

disastrous consequences of driving while under the influence of alcohol. Since the defendant's prior convictions are particularly relevant to prove an absence of mistake, the first element is satisfied.

The second element, similarity, is only required in cases where conduct is offered to prove intent or identity. *Arambula-Ruiz*, 987 F.2d at 603. Here, the prior conviction for driving while under the influence is substantively identical to the pending charge of driving while under the influence of alcohol. The 2007 conviction for reckless driving is substantially similar to the conduct in this case. Thus, the second element is satisfied.

The United States intends to provide proof of the defendant's prior conduct based on certified records of conviction. Thus, the third element of admissibility is satisfied because the defendant's prior conduct resulted in convictions for driving while under the influence and reckless driving. A conviction by itself is sufficient proof of the prior conduct. *Howell*, 231 F.3d at 628-29.

As to the fourth element, that of recency, this element does not weigh in favor of admissibility with regard to the 1993 felony conviction. The prior conviction for felony driving while under the influence occurred approximately fourteen years ago. The element of recency does weigh in favor of the admissibility of the 2007 reckless driving conviction, which took place earlier this year. Moreover, the conduct that led to the defendant's arrest in the 2007 reckless driving case took place after the defendant had been arrested in this case. Courts have determined that convictions stemming from a number of years ago are not too remote under Rule 404(b). *See, e.g.*, *id.* at 629 (six years not too remote); *Arambula-Ruiz*, 987 F.2d at 604 (five years not too remote). In sum, an analysis of the four factors of admissibility under Rule 404(b) dictates that the Court should admit evidence of defendant's prior felony 1993 conviction for driving while under the influence and 2007 reckless driving conviction.

III. ADMISSIBILITY OF EVIDENCE UNDER RULE 403

Rule 403 of the Federal Rules of Evidence requires the exclusion of evidence only where its "probative value is substantially outweighed by the danger of unfair prejudice." Unfair prejudice is found only where the evidence "provokes an emotional response in the jury or otherwise tends

to affect adversely the jury's attitutde toward the defendant wholly apart from its judgment as to his guilt or innocence of the crime charged." *United States v. Bailleaux*, 685 F.2d 1105, 1111 (9th Cir. 1982). Evidence is *not* unfairly prejudicial simply because it tends to convince the jury of the defendant's guilt; it is only when the evidence moves the jury on a basis unrelated to the merits of the case that it is unfairly prejudicial.[2] In determining the probative value of the evidence, the Court must consider not only the logical inferences that the evidence will support, but also the actual "need for evidence of prior criminal conduct to prove a particular point." *Id.* at 1112. The court must then balance the probative value against the danger of unfair prejudice, but can exclude the evidence only when prejudice *substantially* outweighs any probative value. *Id.* at 1111-12, n.2; *Arambula-Ruiz*, 987 F.2d at 602.

In this case, based on defendant's conduct and similarities between his prior conviction and the conduct charged in this case, evidence of his prior conviction for driving while under the influence rebuts any defense that defendant's conduct was a mistake.

IV. CONCLUSION

For the foregoing reasons, the government respectfully requests that the Court grant its Motion in Limine and permit the admission of evidence of defendant's prior felony 1993 conviction for driving while under the influence and 2007 reckless driving conviction pursuant to Fed. R. Evid. 404(b).

DATED: October 29, 2007

Respectfully submitted,

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/s/ Wendy Thomas
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[2] In fact, since most evidence has some prejudicial impact, merely prejudicial evidence alone does not result in exclusion under Rule 403. *United States v. Von der Linden*, 561 F.2d 1340 (9th Cir. 1977) (per curiam) ("It is the hallmark of criminal prosecutions that relevant incriminating evidence prejudices a defendant."); *see United States v. Guyton*, 36 F.3d 655, 660 (7th Cir. 1994) ("It is axiomatic that all relevant evidence bearing on the guilt of the defendant is inherently prejudicial.").